

**FEDERAL ELECTION COMMISSION**  
**FIRST GENERAL COUNSEL'S REPORT**

**MUR 7142**

DATE COMPLAINT FILED: Sept. 26, 2016  
DATE OF NOTIFICATIONS: Sept. 29, 2016  
RESPONSE RECEIVED: Nov. 18, 2016  
DATE ACTIVATED: Jan. 31, 2017

EXPIRATION OF SOL: Sept. 15, 2021  
ELECTION CYCLE: 2016

**COMPLAINANT:** Foundation for Accountability and Civic Trust

**RESPONDENTS:** Evan Bayh  
Evan Bayh Committee and Dennis Charles  
in his official capacity as treasurer  
Senate Majority PAC and Rebecca Lambe in  
her official capacity as treasurer

**RELEVANT STATUTES  
AND REGULATIONS:** 52 U.S.C. § 30116(a), (f)  
52 U.S.C. § 30118(a)  
11 C.F.R. § 109.21  
11 C.F.R. § 109.23

**INTERNAL REPORTS CHECKED:** Disclosure Reports

**AGENCIES CHECKED:** None

**I. INTRODUCTION**

Complainant alleges that the principal campaign committee of U.S. Senate candidate Evan Bayh, Evan Bayh Committee and Dennis Charles in his official capacity as treasurer ("Committee"), coordinated advertisements with Senate Majority PAC, an independent-expenditure-only political committee ("IEOPC"), resulting in excessive and prohibited in-kind contributions in violation of the Federal Election Campaign Act, as amended (the "Act"). We recommend that the Commission find no reason to believe that the Respondents violated 52 U.S.C. §§ 30116(a), 30116(f) or 30118(a), and close the file.

## II. FACTUAL BACKGROUND

Complainant alleges that the Committee coordinated advertisements with Senate Majority PAC by placing information on the "Hoosiers Needs to Know" page of its publicly available campaign website for the purpose of directing Senate Majority PAC to purchase advertisements in specific markets and with specific messages.

On September 12, 2016, the Committee posted to its website:

In Indianapolis and all across the State, Hoosier seniors and the [sic] their grown children need to learn that Washington Congressman Todd Young has voted 5 times to allow Social Security funds be gambled on risky Wall Street markets even saying he is 'proud' to back a plan that means deep cuts to Social Security. Young is even for raising the Social Security and retirement age, putting hard-earned benefits further down the road. The sons and daughters of hard working Hoosier seniors respect social security and understand it is a promise from one generation to the next – one their parents earned, rely on and that they will, too. Todd Young has worked to undermine that promise and can't be trusted. Todd Young: A Washington Politician in it for himself. Not Indiana.<sup>1</sup>

On September 15, 2016, three days later, Senate Majority PAC disseminated an ad transcribed as follows:

We've paid into Social Security, we've earned it, and depend on it. So it's troubling to see Congressman Young call Social Security a Ponzi scheme. Young said he's proud to back a plan that would make devastating cuts to Social Security. He'd even raise the retirement age. Congressman Young, a Washington politician, out for himself, not us.<sup>2</sup>

---

<sup>1</sup> Compl. Ex. C.

<sup>2</sup> Senate Majority PAC, *See It*, YOUTUBE (published Sept. 15, 2016), [https://www.youtube.com/watch?v=EYxfy02kL\\_A](https://www.youtube.com/watch?v=EYxfy02kL_A). Senate Majority PAC disclosed a media buy opposing Young on September 15, 2016 for \$570,105. *See* Senate Majority PAC 24/48 Hour Report of Independent Expenditures (Sept. 16, 2016). According to a press article, the ads were to be aired on television. Alex Roarty, *Democratic Super PAC Planning to Run Ads in Support of Bayh*, ROLL CALL (Sept. 13, 2016), <http://www.rollcall.com/news/politics/democratic-super-pac-planning-run-ads-support-bayh>.

1 Complainant argues that the specificity of the Committee's website regarding the  
2 message, demographics targeted, and the desired media markets, coupled with the timing of  
3 when the Senate Majority PAC ran ads with similar messages, indicates that the Committee used  
4 the website to coordinate the ad with Senate Majority PAC. Therefore, Senate Majority PAC  
5 allegedly made, and the Committee accepted, prohibited and excessive contributions in violation  
6 of the Act.<sup>3</sup>

7 Respondents argue that the information posted on the Committee's publicly available  
8 website cannot satisfy the coordinated communications test as a matter of law and, therefore, the  
9 Commission should find no reason to believe that a violation occurred.<sup>4</sup>

### 10 III. LEGAL ANALYSIS

11 The Act provides that an expenditure made by any person "in cooperation, consultation,  
12 or concert, with, or at the request or suggestion of, a candidate, his authorized political  
13 committees, or their agents" constitutes an in-kind contribution.<sup>5</sup> IEOPCs are prohibited from  
14 making contributions to candidates and their authorized committees.<sup>6</sup> Further, it is unlawful for  
15 candidates and political committees to knowingly accept a prohibited or excessive contribution.<sup>7</sup>

16 The Commission's regulations provide a three-part test for determining when a  
17 communication is a coordinated expenditure, which is treated as an in-kind contribution.<sup>8</sup> The

---

<sup>3</sup> Compl. at 4-7.

<sup>4</sup> Senate Majority PAC Resp. at 3-4; Evan Bayh and Evan Bayh Committee Resp. at 3-4.

<sup>5</sup> 52 U.S.C. § 30116(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20 (definition of "coordinated"), 52 U.S.C. § 30104(b) (requiring political committees to disclose to the Commission contributions received from other political committees and persons).

<sup>6</sup> *See* 52 U.S.C. §§ 30116(a), 30118(a); Advisory Op. 2010-11 (Commonsense Ten) at 2-3.

<sup>7</sup> *See* 52 U.S.C. §§ 30116(f), 30118(a).

<sup>8</sup> 11 C.F.R. § 109.21(a)-(b).

1 communication must: (1) be paid for by a third party; (2) satisfy one of the "content" standards  
2 listed in 11 C.F.R. § 109.21(c); and (3) satisfy one of the "conduct" standards listed in 11 C.F.R.  
3 § 109.21(d).<sup>9</sup> Respondents do not challenge that the first two elements are satisfied.

4 As to the third element, Complainant argues that the ad satisfies the "request or  
5 suggestion" conduct standard, which requires that the communication be "created, produced, or  
6 distributed at the request or suggestion of a candidate [or] authorized committee."<sup>10</sup> The  
7 Commission has explained that the "request or suggestion" standard refers to requests or  
8 suggestions "made to a select audience, but not those offered to the public generally."<sup>11</sup> In  
9 describing the distinction between generalized and targeted requests, the Commission observed  
10 that "a request that is posted on a web page that is available to the general public is a request to  
11 the general public and does not trigger the [request or suggestion] conduct standard," whereas a  
12 request sent through an intranet service or by email to a discrete group of recipients would satisfy  
13 the standard.<sup>12</sup>

14 In MUR 7124 (McGinty for Senate), the Commission found that the use of publicly  
15 available information, including the use of information contained on a candidate's website, was

---

<sup>9</sup> *Id.* § 109.21(a).

<sup>10</sup> *Id.* § 109.21(d)(1); *see also* Compl. at 6.

<sup>11</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (explanation and justification) ("2003 E&J"). The Complaint argues that in 2006 the Commission added a safe harbor to each conduct standard under the regulations for publicly available information except the request or suggestion conduct standard, which purportedly evidences the Commission's intent to exclude the request or suggestion conduct standard from the safe harbor. *See* Coordinated Communications, 71 Fed. Reg. 33190, 33204-05 (June 8, 2006) ("2006 E&J"). The 2006 E&J, however, explicitly notes that the publicly available information safe harbor was not added to the "request or suggestion" conduct standard to avoid circumvention of the coordination rules when a payor uses publicly available information *in conjunction with* a candidate's privately conveyed request or suggestion. *Id.* There is no allegation here that the Committee made any private request or suggestion to Senate Majority PAC.

<sup>12</sup> *See* 2003 E&J at 432.

1 not sufficient to satisfy the “request or suggestion” conduct standard.<sup>13</sup> In that case, the  
2 Complaint alleged that McGinty’s principal campaign committee coordinated with IEOPCs by  
3 posting on its website information it wanted incorporated in ads in certain markets with the code  
4 words “voters need to know.”<sup>14</sup> The IEOPCs in that matter allegedly responded to the posts with  
5 ads in the desired markets. The Commission found no reason to believe that a violation had  
6 occurred because the “cited similarities between the [website] and the commercials, and the  
7 timing and geographic placement of the commercials, are insufficient to show that any additional  
8 private communications occurred.”<sup>15</sup>

9 Similar to MUR 7124, here, the alleged request for advertising made by the Committee  
10 was communicated only by information appearing on the candidate’s publicly available  
11 campaign website. The Complaint does not allege any private communication between the  
12 Committee and Senate Majority PAC. The similarities between the website information and  
13 the timing and placement of the ads disseminated by Senate Majority PAC, just as in MUR 7124,  
14 are insufficient standing alone to show that any additional private communications occurred.  
15 Therefore, the communication at issue does not appear to satisfy the conduct standard.<sup>17</sup>

---

<sup>13</sup> Factual & Legal Analysis (“F&LA”) at 10, MUR 7124 (McGinty for Senate); *see also* F&LA at 7-8, MUR 6821 (Shaheen for Senate).

<sup>14</sup> F&LA at 3, MUR 7124 (McGinty for Senate). Complainant relied on the same Politico article in both complaints. *See id.* Compl. Ex. A, Compl. Ex. A, MUR 7142 (Evan Bayh Committee).

<sup>15</sup> F&LA at 10, MUR 7124 (McGinty for Senate); *id.*, Certification (Apr. 28, 2017).

<sup>17</sup> *See* F&LA at 10-11, MUR 7124 (McGinty for Senate). Though not alleged, we also note that the ad does not appear to constitute a republication of campaign materials because the ads are merely thematically similar to the website and not a direct copy of any campaign materials of which we are aware. *See* 11 C.F.R. § 109.23; *see also* F&LA at 7, MUR 6821 (Shaheen for Senate).

1 Because the available record does not provide information sufficient to show that the  
2 Committee may have coordinated with Senate Majority PAC, we recommend that the  
3 Commission find no reason to believe that Respondents violated 52 U.S.C. §§ 30116(a),  
4 30116(f) or 30118(a), and close the file.<sup>18</sup>

5 **IV. RECOMMENDATIONS**

- 6 1. Find no reason to believe that Evan Bayh violated 52 U.S.C. §§ 30116(f) or 30118(a);  
7  
8 2. Find no reason to believe that Evan Bayh Committee and Dennis Charles in his official  
9 capacity as treasurer violated 52 U.S.C. §§ 30116(f) or 30118(a);  
10  
11 3. Find no reason to believe that Senate Majority PAC and Rebecca Lambe in her official  
12 capacity as treasurer violated 52 U.S.C. §§ 30116(a) or 30118(a);  
13  
14 4. Approve the attached Factual and Legal Analysis;  
15  
16 5. Approve the appropriate letters; and  
17  
18 6. Close the file.  
19  
20  
21

22 Lisa J. Stevenson  
23 Acting General Counsel  
24

25  
26 10/24/17  
27 DATE

*Kathleen M. Guith*  
Kathleen M. Guith  
Associate General Counsel for  
Enforcement

30  
31  
32 *Mark Allen*  
33 Mark Allen  
34 Assistant General Counsel  
35  
36

---

18

See MUR 7136 (Strickland for Senate).



---

Nicholas I. Bamman  
Attorney

1  
2  
3  
4  
5  
6  
7

UNCLASSIFIED

**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** Evan Bayh **MUR: 7142**  
Evan Bayh Committee and Dennis Charles  
in his official capacity as treasurer  
Senate Majority PAC and Rebecca Lambe in  
her official capacity as treasurer

**I. INTRODUCTION**

Complainant alleges that the principal campaign committee of U.S. Senate candidate Evan Bayh, Evan Bayh Committee and Dennis Charles in his official capacity as treasurer ("Committee"), coordinated advertisements with Senate Majority PAC, an independent-expenditure-only political committee ("TEOPC"), resulting in excessive and prohibited in-kind contributions in violation of the Federal Election Campaign Act, as amended (the "Act"). For the reasons below, the Commission finds no reason to believe that the Respondents violated 52 U.S.C. §§ 30116(a), 30116(f) or 30118(a), and closes the file.

**II. FACTUAL BACKGROUND**

Complainant alleges that the Committee coordinated advertisements with Senate Majority PAC by placing information on the "Hoosiers Needs to Know" page of its publicly available campaign website for the purpose of directing Senate Majority PAC to purchase advertisements in specific markets and with specific messages.

On September 12, 2016, the Committee posted to its website:

In Indianapolis and all across the State, Hoosier seniors and the [sic] their grown children need to learn that Washington Congressman Todd Young has voted 5 times to allow Social Security funds be gambled on risky Wall Street markets even saying he is 'proud' to back a plan that means deep cuts to Social Security. Young is even for raising the Social Security and retirement age, putting hard-earned benefits further down the road. The sons and daughters of hard working Hoosier seniors respect social security and understand



1 it is a promise from one generation to the next – one their parents  
2 earned, rely on and that they will, too. Todd Young has worked to  
3 undermine that promise and can't be trusted. Todd Young: A  
4 Washington Politician in it for himself. Not Indiana.<sup>1</sup>  
5

6 On September 15, 2016, three days later, Senate Majority PAC disseminated an ad  
7 transcribed as follows:

8 We've paid into Social Security, we've earned it, and depend on it.  
9 So it's troubling to see Congressman Young call Social Security a  
10 Ponzi scheme. Young said he's proud to back a plan that would  
11 make devastating cuts to Social Security. He'd even raise the  
12 retirement age. Congressman Young, a Washington politician, out  
13 for himself, not us.<sup>2</sup>  
14

15 Complainant argues that the specificity of the Committee's website regarding the  
16 message, demographics targeted, and the desired media markets, coupled with the timing of  
17 when the Senate Majority PAC ran ads with similar messages, indicates that the Committee used  
18 the website to coordinate the ad with Senate Majority PAC. Therefore, Senate Majority PAC  
19 allegedly made, and the Committee accepted, prohibited and excessive contributions in violation  
20 of the Act.<sup>3</sup>

21 Respondents argue that the information posted on the Committee's publicly available  
22 website cannot satisfy the coordinated communications test as a matter of law and, therefore, the  
23 Commission should find no reason to believe that a violation occurred.<sup>4</sup>

---

<sup>1</sup> Compl. Ex. C.

<sup>2</sup> Senate Majority PAC, *See It*, YOUTUBE (published Sept. 15, 2016),  
[https://www.youtube.com/watch?v=EYxfy02kL\\_A](https://www.youtube.com/watch?v=EYxfy02kL_A). Senate Majority PAC disclosed a media buy opposing Young  
on September 15, 2016 for \$570,105. *See* Senate Majority PAC 24/48 Hour Report of Independent Expenditures  
(Sept. 16, 2016).

<sup>3</sup> Compl. at 4-7.

<sup>4</sup> Senate Majority PAC Resp. at 3-4; Evan Bayh and Evan Bayh Committee Resp. at 3-4.

1     **III.   LEGAL ANALYSIS**

2           The Act provides that an expenditure made by any person “in cooperation, consultation,  
3   or concert, with, or at the request or suggestion of, a candidate, his authorized political  
4   committees, or their agents” constitutes an in-kind contribution.<sup>5</sup> IEOPCs are prohibited from  
5   making contributions to candidates and their authorized committees.<sup>6</sup> Further, it is unlawful for  
6   candidates and political committees to knowingly accept a prohibited or excessive contribution.<sup>7</sup>

7           The Commission’s regulations provide a three-part test for determining when a  
8   communication is a coordinated expenditure, which is treated as an in-kind contribution.<sup>8</sup> The  
9   communication must: (1) be paid for by a third party; (2) satisfy one of the “content” standards  
10   listed in 11 C.F.R. § 109.21(c); and (3) satisfy one of the “conduct” standards listed in 11 C.F.R.  
11   § 109.21(d).<sup>9</sup> Respondents do not challenge that the first two elements are satisfied.

12          As to the third element, Complainant argues that the ad satisfies the “request or  
13   suggestion” conduct standard, which requires that the communication be “created, produced, or  
14   distributed at the request or suggestion of a candidate [or] authorized committee.”<sup>10</sup> The  
15   Commission has explained that the “request or suggestion” standard refers to requests or

---

<sup>5</sup>       52 U.S.C. § 30116(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20 (definition of “coordinated”), 52 U.S.C. § 30104(b) (requiring political committees to disclose to the Commission contributions received from other political committees and persons).

<sup>6</sup>       *See* 52 U.S.C. §§ 30116(a), 30118(a); Advisory Op. 2010-11 (Commonsense Ten) at 2-3.

<sup>7</sup>       *See* 52 U.S.C. §§ 30116(f), 30118(a).

<sup>8</sup>       11 C.F.R. § 109.21(a)-(b).

<sup>9</sup>       *Id.* § 109.21(a).

<sup>10</sup>      *Id.* § 109.21(d)(1); *see also* Compl. at 6.

1 suggestions “made to a select audience, but not those offered to the public generally.”<sup>11</sup> In  
2 describing the distinction between generalized and targeted requests, the Commission observed  
3 that “a request that is posted on a web page that is available to the general public is a request to  
4 the general public and does not trigger the [request or suggestion] conduct standard,” whereas a  
5 request sent through an intranet service or by email to a discrete group of recipients would satisfy  
6 the standard.<sup>12</sup>

7 In MUR 7124 (McGinty for Senate), the Commission found that the use of publicly  
8 available information, including the use of information contained on a candidate’s website, was  
9 not sufficient to satisfy the “request or suggestion” conduct standard.<sup>13</sup> In that case, the  
10 Complaint alleged that McGinty’s principal campaign committee coordinated with IEOPCs by  
11 posting on its website information it wanted incorporated in ads in certain markets with the code  
12 words “voters need to know.”<sup>14</sup> The IEOPCs in that matter allegedly responded to the posts with  
13 ads in the desired markets. The Commission found no reason to believe that a violation had  
14 occurred because the conduct standard of the coordinated communications test had not been

---

<sup>11</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (explanation and justification) (“2003 E&J”). The Complaint argues that in 2006 the Commission added a safe harbor to each conduct standard under the regulations for publicly available information except the request or suggestion conduct standard, which purportedly evidences the Commission’s intent to exclude the request or suggestion conduct standard from the safe harbor. See Coordinated Communications, 71 Fed. Reg. 33190, 33204-05 (June 8, 2006) (“2006 E&J”). The 2006 E&J, however, explicitly notes that the publicly available information safe harbor was not added to the “request or suggestion” conduct standard to avoid circumvention of the coordination rules when a payor uses publicly available information *in conjunction with* a candidate’s privately conveyed request or suggestion. *Id.* There is no allegation here that the Committee made any private request or suggestion to Senate Majority PAC.

<sup>12</sup> See 2003 E&J at 432.

<sup>13</sup> Factual & Legal Analysis (“F&LA”) at 10, MUR 7124 (McGinty for Senate); see also F&LA at 7-8, MUR 6821 (Shaheen for Senate).

<sup>14</sup> F&LA at 3, MUR 7124 (McGinty for Senate). Complainant relied on the same Politico article in both complaints. See *id.* Compl. Ex. A, Compl. Ex. A, MUR 7142 (Evan Bayh Committee).

1 satisfied: Posting material to the campaign's publicly available website did not satisfy the  
2 request or suggestion standard.<sup>15</sup> Similar to MUR 7124, here, the alleged request for advertising  
3 made by the Committee was communicated only by information appearing on the candidate's  
4 publicly available campaign website<sup>16</sup> Therefore, the communication at issue does not satisfy  
5 the conduct standard.<sup>17</sup>

6 Because the available record does not provide information sufficient to show that the  
7 Committee may have coordinated with Senate Majority PAC, the Commission finds no reason to  
8 believe that Respondents violated 52 U.S.C. §§ 30116(a), 30116(f) or 30118(a), and closes the  
9 file.

---

<sup>15</sup> F&LA at 10, MUR 7124 (McGinty for Senate); *id.*, Certification (Apr. 28, 2017). One of the super PAC's ads in MUR 7124 (McGinty for Senate) ran *before* the candidate's website posted the alleged "request" for the ad. Thus, the complaint in MUR 7124 "suggests that the [candidate's] Committee may have informed [the super PAC] of the [request] in private" prior to posting the request on the candidate's website, F&LA at 7, MUR 7124 (McGinty for Senate), or may have retroactively approved the super PAC's ad. *See* Complaint at 7, MUR 7124 (McGinty for Senate). In response, the Commission found that that the "cited similarities between the [website] and the commercials, and the timing and geographic placement of the commercials, are insufficient to show that any additional private communications occurred." *Id.* at 10. Here, the Complaint does not allege that the super PAC aired ads before the Committee's alleged "request" was made.

<sup>16</sup> F&LA at 10, MUR 7124 (McGinty for Senate).

<sup>17</sup> *See* F&LA at 10-11, MUR 7124 (McGinty for Senate). Though not alleged, we also note that the ad does not appear to constitute a republication of campaign materials because the ads are merely thematically similar to the website and not a direct copy of any campaign materials of which we are aware. *See* 11 C.F.R. § 109.23; *see also* F&LA at 7, MUR 6821 (Shaheen for Senate).